

ITEM NO. 10

November 18, 2005

ERRATA SHEET

CHANGES TO ORDER NO. R8-2005-0119

(Language added is underlined.)

(Language deleted is ~~struck out~~)

1. Order No. R8-2005-00119, FINDINGS, Page 2 of 5, amend Finding 6. as follows:
 6. In compliance with the California Environmental Quality Act, an Environmental Impact Report has been prepared and was certified by the City of Orange on October 25, 2005. A Notice of Determination was filed on November ~~8~~ 9, 2005.

**California Regional Water Quality Control Board
Santa Ana Region**

November 18, 2005

ITEM: 10

SUBJECT: Order No. R8-2005-0119, The Irvine Company, East Orange Planned Community, Orange County

SUMMARY

The matter before the Board is to consider adoption of Order No. R8-2005-0119, which authorizes the discharge of dredge or fill to waters of the State that have been determined by the U.S. Army Corps of Engineers to be outside of its jurisdiction and not subject to regulation under to Clean Water Act Section 404 (non-federal waters).

BACKGROUND

On September 17, 2004, the Regional Board adopted Order No. R8-2004-0071 for the Irvine Company, authorizing the excavation of five to ten isolated seasonal pools near the Santiago Landfill in Orange County. Neither a Clean Water Act Section 404 permit from the U.S. Army Corps of Engineers nor a Section 401 Water Quality Standards Certification from the Regional Board was required for this activity, given the isolated nature of the ponds and the determination by the Corps that the ponds were outside Corps' jurisdiction. However, the isolated ponds are considered waters of the state. In this and comparable situations, the Regional Board regulates waste discharges resulting from dredge and fill activities pursuant to the authorities provided by the Water Code.

Order No. R8-2004-0071 authorized the excavation of up to approximately 0.70 acres of waters of the State in two phases. The excavation was needed to provide advance implementation of mitigation for impacts related to the Irvine Company's future construction of the East Orange Planned Community (EOPC), which would result in the fill of five of the seasonal pools. The mitigation program included the relocation of western spadefoot toads, a U.S. Fish and Wildlife Service and California species of special concern, from the seasonal pools to new pools to be constructed within the Irvine Ranch Land Reserve. The seasonal pools were also habitat for the versatile fairy shrimp and Pacific tree frog. Implementation of the western spadefoot toad relocation program also included collecting intact sections of the surface layer biomass (inoculum) from the seasonal pools. The inoculum was used to colonize the newly created pools with the versatile fairy shrimp. The U.S. Fish and Wildlife Service provided written approval of the relocation program. The implementation of the relocation Program in advance of the development of EOPC was proposed and authorized in order to increase the likelihood of success of the relocation effort and minimize disruption of the western spadefoot toad.

In January 2005, The Irvine Company excavated the existing seasonal pools and completed the construction of twenty-two (22) new pools. Sixteen (16) new pools were created in Irvine Mesa and six (6) were created in Shoe String Canyon within the Irvine Ranch Land Reserve. According to a report provided by The Irvine Company on October 3, 2005, 123 tadpoles and metamorphs have been relocated. The relocated toads appear to be maturing in their new environment, indicative that the beneficial uses of the pools have been successfully compensated.

Order No. R8-2005-0119

Staff Report

Order No. R8-2004-0071 did not authorize the discharge of fill to the isolated seasonal ponds waters of the State in association with the development of the EOPC. These discharges are the subject of the proposed Order No. R8-2005-0119. Again, no Section 404 permit or Section 401 Certification is required, but it is necessary and appropriate to regulate the discharges pursuant to waste discharge requirements.

On December 4, 2004, The Irvine Company submitted an application for Clean Water Act Section 401 Certification for the development of EOPC. The application included a ROWD for the discharge of fill to the seasonal pools near the Santiago Landfill. In consideration of the apparent ongoing success of the Relocation Plan and its creation of compensatory waters of the State, Regional Board staff does not recommend that the Board require additional mitigation measures for the discharge of fill to the seasonal pools. Had the relocation effort failed to support the beneficial uses of the original seasonal pools or had it not been completed in a timely manner, additional mitigation would have been appropriate. The proposed Order regulates the fill of the isolated seasonal ponds; it is expected that dredge and fill activities elsewhere on the EOPC site will be regulated pursuant to a Clean Water Act Section 401 Certification and the State Board's Order No. 2003-0017-DWQ, "General Waste Discharge Requirements for Dredge and Fill Discharges That Have Received State Water Quality Certification".

An environmental impact report (EIR) has been prepared for the East Orange Planned Community and is to be considered for certification by the City of Orange on November 8, 2005. Consideration of adoption of the proposed Order is contingent on CEQA compliance and certification of the EIR.

RECOMMENDATION

Provided that the City of Orange certifies the EIR for the East Orange Planned Community prior to November 18, 2005, Board staff recommends that the Regional Board adopt Order No. R8-2005-0119, as presented.

California Regional Water Quality Control Board
Santa Ana Region

Order No. R8-2005-0119

Waste Discharge Requirements

for

The Irvine Company
East Orange Planned Community
Orange County

The California Regional Water Quality Control Board, Santa Ana Region (hereinafter Board), finds that:

1. The Irvine Company proposes the development of the East Orange Planned Community (EOPC) in the vicinity of Lake Irvine in Orange County. EOPC includes the development of 2,350 dwelling units in three planning areas. In addition, EOPC includes two passive public park sites, a 20-acre sports park, a commercial recreational use area, and associated roadways and infrastructure on 1,020 acres of an approximately 4,800-acre site within the City of Orange sphere of influence. The project involves the realignment of Santiago Canyon Road, which bisects the larger project area. The Irvine Company is proposing to fill waters of the State as part of the development of EOPC.
2. The affected waters of the State are ten isolated pools with a combined area of approximately 0.70 acres. All of the pools are artificial, having been created as borrow sites during operation of the adjacent Santiago landfill. All of the pools meet the U.S. Army Corps of Engineers (Corps) criteria as waters of the U.S., however, the Corps has declined to take jurisdiction over these isolated features and the Corps will not issue a Clean Water Act (CWA) Section 404 Permit. Similarly, CDFG has declined jurisdiction because these features do not meet the definition of a streambed or lake.
3. The affected waters of the State are habitat for the Western Spadefoot Toad (WST), versatile fairy shrimp, and Pacific tree frog. WST is a U.S. Fish and Wildlife Service (FWS) and California species of special concern. In order to mitigate impacts to WST, The Irvine Company implemented a WST Relocation Program approved by the FWS in late 2004. The Irvine Company implemented the initial phases of this Program in advance of EOPC development in order to improve the likelihood of WST relocation success. The proposed mitigation program involved the excavation of the pools. The excavation of the pools constituted a discharge of fill subject to regulation by the Regional Board. The Regional Board authorized the discharge of fill through the adoption of Order No. R8-2004-0071 on September 17, 2004.

4. The waste discharge requirements proposed herein address the discharge of fill to the isolated pools as the result of the development of EOPC. This discharge was not addressed with the Regional Board's adoption of Order No. R8-2004-0071.
5. On October 3, 2005, The Irvine Company submitted a report on the progress of the ongoing WST Relocation Program. In that report, The Irvine Company indicated that the relocated WST tadpoles and metamorphs were growing and developing. The Irvine Company's report is indicative that the beneficial uses of the isolated pools have been adequately compensated.
6. In compliance with the California Environmental Quality Act, an Environmental Impact Report has been prepared and certified by the City of Orange. A Notice of Determination was filed on November 8, 2005.
7. The discharger has conducted a Biological Assessment of the site and found no threatened or endangered species designated under State or Federal law.
8. The artificial seasonal pools are isolated and exhibit no surface or subsurface connection with other waters of the state (i.e., receiving waters). No beneficial uses are designated for the affected artificial, isolated pools within the Santa Ana River Basin Water Quality Control Plan (1995), however, the applicant's biological assessment documents the following beneficial uses as existing or as attainable:
 - a. Wildlife Habitat (WILD)
 - b. Warm Freshwater Habitat (WARM)
 - c. Spawning, Reproduction, and Development (SPWN).
9. Waste Discharge Requirements (WDRs) are necessary to address impacts of the fill of waters of the State and to meet the objectives of the State Wetlands Conservation Policy (Executive Order W-59-93).
10. The goals of the California Wetlands Conservation Policy (Executive Order W-59-93, signed August 23, 1993) include ensuring "no overall loss" and achieving a "...long-term net gain in the quantity, quality, and permanence of wetland acreage and values...." Senate Concurrent Resolution No. 28 states that "[i]t is the intent of the legislature to preserve, protect, restore, and enhance California's wetlands and the multiple resources which depend on them for benefit of the people of the State."
11. The Regional Board has considered antidegradation pursuant to State Board Resolution No. 68-16 and finds that the discharge is consistent with those provisions.
12. The Board has notified the discharger and other interested agencies and persons of its intent to prescribe waste discharge requirements for the discharge and has provided them with an opportunity for public hearing and opportunity to submit their written views and recommendations.

13. The Board, in a public meeting, heard and considered all comments pertaining to the discharge.

IT IS HEREBY ORDERED that the discharger, in order to meet the provisions contained in Division 7 of the California Water Code and regulations adopted thereunder, shall comply with the following:

A. DISCHARGE SPECIFICATIONS:

1. No activities associated with the project shall cause or threaten to cause a nuisance or pollution as defined in Section 13050 of the California Water Code.
2. The discharge of any substance in concentrations toxic to animal or plant life is prohibited.
3. The groundwater in the vicinity of the project shall not be degraded as a result of the project activities or placement of fill for the project.
4. The discharge of fill materials shall be limited to inert materials, as defined in Section 20230, Division 2, Title 27. The discharge of fill material other than native soil shall be only with the prior approval of the Executive Officer.

B. DISCHARGE PROHIBITIONS:

1. The direct discharge of wastes, including rubbish, refuse, bark, sawdust, or other solid wastes into surface waters or at any place where they would contact or where they would be eventually transported to surface waters, including flood plains, is prohibited except as authorized under these WDRs.
2. The discharge of floating oil or other floating materials from any activity in quantities sufficient to cause deleterious bottom deposits, turbidity, or discoloration in surface waters is prohibited.
3. The discharge of silt, sand, clay, or other earthen materials from any activity in quantities sufficient to cause deleterious bottom deposits, turbidity, or discoloration in surface waters is prohibited.
4. Discharges to surface waters of wastes or pollutants that are not otherwise regulated by a separate National Pollutant Elimination System (NPDES) permit, is prohibited.

C. PROVISIONS:

1. The discharger shall continue monitoring the created seasonal pools consistent with the WST Relocation Program, dated May 2004, for the purpose of assuring that the created seasonal pools fully support the beneficial uses of the filled waters of the State. If, during the monitoring period, FWS staff determines that

the created seasonal pools are of insufficient size, depth, or otherwise require hydro-modification in order to support the target beneficial uses, the discharger shall notify the Executive Officer in writing, identify a plan and schedule for implementation of proposed remedial measures and implement the remedial action plan upon approval.

2. The discharger shall maintain a copy of this Order at the site so that it is available to site operating personnel at all times. Key operating personnel shall be familiar with its content.
3. The discharger shall remove from the site any waste or fill material found to contain substances that may have a deleterious effect on water quality, and dispose of unacceptable wastes in a manner acceptable to the Executive Officer.
4. The discharger must comply with all of the requirements of this Order. Any violation of this Order constitutes a violation of the California Water Code and may constitute a violation of the CWA and its regulations, and is grounds for enforcement action, termination of this Order, revocation and re-issuance of this Order, denial of an application for re-issuance of this Order; or a combination thereof.
5. The discharger shall take all reasonable steps to minimize or prevent any discharge that has a reasonable likelihood of adversely affecting human health or the environment.
6. The provisions of this Order are severable, and if any provision of this Order, or the application of any provisions of this Order to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this Order shall not be affected thereby.
7. The filing of a request by the discharger for modification, revocation and re-issuance, or termination of this Order or a notification of planned changes or anticipated noncompliance does not stay any requirements of this Order.
8. The requirements prescribed herein do not authorize the commission of any act causing injury to the property of another, nor protect the discharger from liabilities under federal, state, or local laws, nor guarantee the discharger a capacity right in the receiving waters.
9. This Order does not convey any property rights of any sort, or any exclusive privilege.
10. This Order is not transferable to any person except after notice to, and approval by, the Executive Officer. The Regional Board may require modification or revocation and re-issuance of this Order to change the name of the discharger.
11. In the event of any change in control or ownership of land or waste discharge facility presently owned or controlled by the discharger, the discharger shall notify the succeeding owner or operator of the existence of this Order by letter, a copy of which shall be forwarded to the Regional Board.

12. The Regional Board and other authorized representatives shall be allowed:
- a. Entry upon premises where a regulated facility or activity is located or conducted, or where records are kept under the requirements of this Order;
 - b. Access to copy any records that are kept under the requirements of this Order;
 - c. To inspect any facility, equipment (including monitoring and control equipment), practices, or operations regulated or required under this Order; and
 - d. To photograph, sample and monitor for the purpose of assuring compliance with this Order.

I, Gerard J. Thibeault, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Santa Ana Region, on November 18, 2005.

Gerard J. Thibeault
Executive Officer